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No. 94-144

In The

Supreme Court of the United States

October Term, 1994

COMBINED MANAGEMENT, INC.,

Petitioner,

v.

BRIAN K. ATCHINSON, In His Representative Capacity As Superintendent, Bureau of Insurance of the State of Maine,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER UNDER THIS COURT'S ANALYSIS IN *SHAW v. DELTA AIRLINES, INC.*, 463 U.S. 85 (1983), THE EXEMPTION FROM ERISA PREEMPTION FOR STATE WORKERS' COMPENSATION LAWS PERMITS MAINE TO REQUIRE EMPLOYERS IN THE STATE TO SECURE WORKERS' COMPENSATION COVERAGE BY USING A MAINE-LICENSED INSURER OR BY QUALIFYING AS AN APPROVED SELF-INSURER.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Brian K. Atchinson, Superintendent to the Maine Bureau of Insurance, respectfully submits that the Supreme Court should deny the Petition for *certiorari* because the decision below follows directly from this Court's ruling in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), and because there is no conflict between the Circuits on the issue presented by this case.

STATUTORY PROVISIONS

Section 4(b)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1003(b)(3), provides in pertinent part as follows:

> The provisions of this title shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable workers' compensation laws or unemployment compensation or disability insurance laws.

ERISA also contains an express preemption provision in section 514(a), 29 U.S.C. § 1144(a), which provides as follows:

> [T]he provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. . . .

Title 39-A Me. Rev. Stat. Ann. § 401(1) provides that "[e]very private employer is subject to [the Maine

Workers' Compensation Act] and shall secure the payment of compensation in conformity with this section and sections 403 to 407. . . . " The primary provisions of the Maine Worker's Compensation Act which Petitioner alleges are preempted by ERISA are 39-A Me. Rev. Stat. Ann. §§ 403(1) and 403(3). Title 39-A Me. Rev. Stat. Ann. § 403(1) provides, in part, that "[t]he employer may comply with this section by insuring and keeping insured the payment of such compensation and other benefits under a workers' compensation insurance policy." Title 39-A-Me. Rev. Stat. Ann. § 403(3) provides the option of self-insurance. It provides, in part, that "[t]he employer may comply with this section by furnishing satisfactory proof to the Superintendent of Insurance of solvency and financial ability to pay the compensation and benefits, and depositing cash, satisfactory securities, irrevocable standby letters of credit issued by a qualified financial institution or a surety bond with the board, in such sum as the superintendent may determine. . . . "

JURISDICTION

The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the First Circuit rendered its decision April 22, 1994. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Respondent Brian K. Atchinson is the duly-appointed Superintendent of Insurance for the State of Maine. *See* 24-A Me. Rev. Stat. Ann. § 201. The Superintendent has responsibility for enforcing provisions of the Maine Insurance Code, *see* 24-A Me. Rev. Stat. Ann. § 211, including certain provisions relating to workers' compensation, *see e.g.*, 24-A Me. Rev. Stat. Ann. §§ 2381-2387-B (Workers' Compensation Rating Act).

Petitioner Combined Management, Inc. ("CMI") is an employee leasing company registered with the Superintendent pursuant to 32 Me. Rev. Stat. Ann. § 14052. CMI allegedly offers subscribing client employers certain health and occupational injury benefits through a plan promulgated by an entity called the International Association of Entrepreneurs of America ("IAEA").

The Maine Workers' Compensation Act requires that employers secure workers' compensation coverage through either a valid commercial insurance policy or a plan of self-insurance authorized by the Superintendent. *See* 39-A Me. Rev. Stat. Ann. §§ 401 and 403. Employers who fail to provide workers' compensation pursuant to the Act lose immunity from common law liability. 39-A Me. Rev. Stat. Ann. § 104. They may also be guilty of a criminal offense, be subject to a civil penalty of up to $10,000, and have their corporate authority to do business in Maine revoked or suspended. 39-A Me. Rev. Stat. Ann. § 324(3). The insurer or the employer is required at all times to demonstrate financial resources sufficient to cover future expected obligations and must submit to

periodic examination by the Superintendent for verification of continuing solvency, which is backed by a guaranty fund. *See, e.g.*, 24-A Me. Rev. Stat. Ann. § 221-A, 410, 4431-4452; 39-A Me. Rev. Stat. Ann. §§ 403 and 404. The law also provides for an insurer of last resort, the Maine Employers' Mutual Insurance Company, so that all employers have an opportunity to obtain coverage to protect themselves and their employees. *See* 24-A Me. Rev. Stat. Ann. §§ 3701-14.

On February 11, 1993, CMI filed a complaint in the United States District Court for the District of Maine, asserting that ERISA preempts Maine statutes mandating the Superintendent's oversight of the business of workers' compensation insurance. Count I of CMI's complaint sought judgment pursuant to 28 U.S.C. § 2201 declaring that subscription to benefits allegedly provided by the IAEA Plan qualifies for ERISA preemption. Count II sought a preliminary and permanent injunction pursuant to Fed.R.Civ.P. 65.

For purposes of deciding the threshold question of the Maine law's exemption from ERISA preemption, the United States Magistrate Judge assumed that CMI provides occupational disability insurance benefits through subscription to an ERISA-qualified employee welfare benefit plan.[1] Pursuant to 28 U.S.C § 636(b)(1)(B), the

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[1] The Superintendent in fact disputes CMI's characterization of the IAEA scheme as "a multiemployer plan" as defined by 29 U.S.C. § 1002(37)(A). CMI's Complaint, ¶ 9. The record fails to substantiate CMI's characterization. Indeed, though the record is admittedly insufficient for a conclusive determination, it appears that the IAEA Plan may be a multiple employer

Magistrate Judge decided that, even given that assumption, ERISA does not preempt Maine's workers' compensation law and, treating the Superintendent's pleadings as a motion pursuant to Fed.R.Civ.P. 12(b)(6), recommended not only denial of CMI's motion for preliminary injunction but also dismissal of its complaint.

CMI filed its objection to the Magistrate Judge's Recommended Decision on June 25, 1993. On August 2, 1993, the U.S. District Court of the District of Maine (Hornby, J.) entered an order affirming the recommended decision of the Magistrate Judge. The district court entered judgment for the Superintendent and against CMI.

On April 22, 1994, after CMI filed an appeal of the district court's decision, the United States Court of Appeals for the First Circuit affirmed the order of the district court, holding not only that Maine's law was exempt from preemption pursuant to 29 U.S.C. § 1003(b)(3) but also that Maine's law did not "relate to" an ERISA plan so as to cause preemption. *Combined Management, Inc. v. Superintendent of the Bureau of Insurance*, 22 F.3d 1 (1st Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3067 (Jul. 21, 1994).

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welfare arrangement ("MEWA") as defined by 29 U.S.C. § 1002(40)(A) which is exempt from ERISA preemption pursuant to 29 U.S.C. § 1144(b)(6)(A). Because the courts below found no preemption even assuming that the IAEA Plan was an ERISA-covered multiemployer plan, this issue need not be reached in this case.

SUMMARY OF ARGUMENT

The Petition alleges that certain provisions of the Maine Workers' Compensation Act are preempted by ERISA. To dispose of the Petition, this Court need go no further than its own analysis in *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), under which states are entitled to require employers to maintain separately administered plans to comply with state workers' compensation, unemployment, or disability insurance laws. Moreover, contrary to Petitioner's contentions, there is no conflict between the Circuits on this issue.

Because *Shaw* controls this case, the Court need not reach the alternative ground discussed by the First Circuit – that the relevant provisions of the Maine Workers' Compensation Act also do not "relate to" an employee benefit plan under ERISA § 514(a), 29 U.S.C. § 1144(a). In any event, the First Circuit correctly decided this issue.

ARGUMENT

I. THE DECISION OF THE FIRST CIRCUIT ACCORDS FULLY WITH CONTROLLING PRECEDENTS OF THIS COURT, WITH CONGRESSIONAL INTENT IN ENACTING ERISA, AND WITH PUBLIC POLICY.

A. The Opinion Below Is Fully In Accord With the Decisions of This Court.

Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), exempts employee benefit plans from ERISA if such plans are maintained solely for the purpose of complying with

applicable state workers' compensation, unemployment compensation, or disability insurance laws. ERISA's pre-emption provision also incorporates this exemption. *See* ERISA § 514(a), 29 U.S.C. § 1144(a). In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), this Court interpreted 29 U.S.C. § 1003(b)(3) to allow states to compel employers to maintain separately administered plans for mandated disability benefits. 463 U.S. at 107. In *District of Columbia v. Greater Washington Board of Trade*, ___ U.S. ___, 113 S.Ct. 580 (1992), this Court reaffirmed *Shaw's* holding that a state law mandating provision of disability benefits is not preempted because it relates "exclusively to exempt employee benefit plans 'maintained solely for the purpose of complying with applicable . . . disability insurance laws' within the meaning of § 4(b)(3), 29 U.S.C. § 1003(b)(3)." 113 S.Ct. at 584.

In *Greater Washington Board of Trade*, noting that the New York statute at issue in *Shaw* expressly permitted employers to satisfy obligations to provide disability insurance through an ERISA-covered multi-benefit plan, the Court stated:

> The fact that employers could comply with the New York law by administering the required disability benefits through a multibenefit ERISA plan did not mean that the law related to such ERISA plans for pre-emption purposes. See [*Shaw*] at 108. . . .
>
> As we have explained, the Disability Benefits Law upheld in *Shaw* – though mandating the creation of a 'welfare plan' as defined in ERISA

> – did not relate to a welfare plan subject to ERISA regulation.

Id. at 584-85. (footnote omitted)

In *Shaw* itself this Court made clear that a state is not rendered powerless to enforce its laws against employers providing multi-benefit plans:

> Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible. *A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit.* Such a plan would be exempt under[§ 1003(b)(3)]. The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multibenefit ERISA plan . . . does not make the state law wholly unenforceable as to employers who choose that option.
>
> In other words, while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan. *If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply.*

463 U.S. at 108 (emphasis added).[2]

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[2] At 24-25 of its Petition, CMI misquotes this critical language from *Shaw* in several respects.

Because 29 U.S.C. §§ 1003(b)(3) and 1144(a) treat state disability and workers' compensation insurance laws identically, *Shaw*'s holding with regard to state disability insurance laws applies equally to state workers' compensation laws. Thus, under *Shaw*, a state may "require an employer to maintain a [workers' compensation] plan complying with state law as a separate administrative unit." *See* 463 U.S. at 108. Similarly, if a state is not satisfied that an employer's ERISA plan "comports with the requirements of its [worker's compensation] law, it may compel the employer to maintain a separate plan that does comply." *Id.* It is abundantly clear in this case that Maine is not satisfied that the IAEA Plan comports with Maine law and that Maine has required separate administration of workers' compensation benefits.

Thus, *Shaw* demonstrates that the Maine laws at issue in this case are not preempted by ERISA. Petitioner's arguments to the contrary are based on a misreading of *Shaw*[3] and are nowhere supported by the case law which Petitioner cites. In particular, while Petitioner seems to suggest that the First Circuit's decision is inconsistent with this Court's ruling in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), *see* Petition at 24, this is simply incorrect. First, *Alessi* predated *Shaw* and cannot be read as a limitation on *Shaw*'s holding. Second, *Alessi* involved a state law declaring that an employee's pension benefits could not be reduced by the amount of any workers'

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[3] Specifically, the "factory" analogy made by CMI at 22-23 of the petition cannot be squared with Shaw's pronouncement that a state may require employers to maintain separate plans in an area exempted from ERISA by 29 U.S.C. § 1003(b)(3).

compensation award for which the employee was eligible. Thus, *Alessi* involved a state law which effectively regulated *pension* benefits – by forbidding any pension offset for workers' compensation awards – not a law requiring employers to set up a separately administered workers' compensation plan. The provisions of Maine's workers' compensation law challenged by Petitioner do not regulate pensions in any way, and *Alessi* is therefore inapplicable.

B. There Is No Conflict in the Circuits on This Issue.

Petitioner also argues that there is a conflict in the Circuits on the issue of whether state laws requiring separate administration of a workers' compensation plan are preempted by ERISA. Petition at 24-26. This is simply incorrect. The only other Circuit that has considered the issue presented in this case is the Ninth Circuit in *Employee Staffing Services, Inc. v. Aubry*, 20 F.3d 1038 (9th Cir. 1994). The Ninth Circuit's *Employee Staffing* decision reached the exact same conclusion as the First Circuit in the case at bar – that a state statute requiring that employers "secure payment of workers' compensation through state-licensed insurance or approved self-insurance", 20 F.3d at 1042, is not preempted by ERISA.

Petitioner's argument that there is nevertheless a conflict between the First and Ninth Circuits is based on alleged differences between the Maine and California workers' compensation laws that either do not exist or

are immaterial to the outcome of this case.[4] Petitioner also alleges that despite *Employee Staffing*, the First Circuit's decision below nevertheless conflicts with the Ninth Circuit because of the Ninth Circuit decision in *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498 (9th Cir. 1993). In the first place, *Employee Staffing* is the Ninth Circuit's latest word on this issue. Second, Petitioner's reliance on *Aloha Airlines* is entirely misplaced because the statute in that case did not involve workers' compensation, unemployment, or disability laws and thus did not fall within the exemption from ERISA preemption contained in 29 U.S.C. § 1003(b)(3).

In support of its claim that there is a conflict in the Circuits, petitioner also refers to the Fourth Circuit's decision in *PPG Industries Pension Plan A (CIO) v. Crews*, 902 F.2d 1148 (4th Cir. 1990), and the Eighth Circuit's decision in *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 2305 (1992). As Petitioner acknowledges, however (Petition at 26), the Eighth Circuit's decision in *Arkansas Blue Cross* did not involve workers' compensation and did not implicate the exemption from preemption contained in § 1003(b)(3). Moreover, the Fourth Circuit's decision in *PPG* simply reiterated this Court's holding in *Alessi* – that a state may not forbid pension benefits and workers'

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[4] The First Circuit noted below that the applicable California statutes are in fact "quite similar" to those of Maine. *See* Pet. App. 8a. Moreover, in the district court, the Magistrate Judge noted the similarity between § 3700 of the California Labor Code at issue in *Employee Staffing Services* and 39-A Me. Rev. Stat. Ann. § 403. *See* Recommended Decision on Motion for Preliminary Injunction at 7 n. 4 (Pet. App. 27a).

compensation benefits from being offset against each other. A state statute forbidding such an offset constitutes preempted regulation of pension benefits. Indeed, *PPG* expressly distinguished the situation where a state law requires separately administered workers' compensation funds, which is the situation in this case. *See* 902 F.2d at 1151.

In sum, there is no conflict between the Circuits on the dispositive issue in this case – the exemption from ERISA for plans maintained to comply with state workers compensation laws.

C. The Decision Below is Consistent With ERISA's Legislative History.

The result below is also entirely consistent with ERISA's legislative history. At the beginning of this century, workers' compensation developed as a state-based system. In the 1970's that state-based workers' compensation system came under criticism because benefits in many cases were inadequate and because many workers were not covered at all. At the beginning of the decade, Congress adopted Senator Jacob Javits's proposal for a National Commission on State Workmen's Compensation Laws to conduct "an effective study and objective evaluation of State workmen's compensation laws." Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, §§ 27(a)(2), 27(b), 27(d)(1), 84 Stat. 1590 at 1616-17 (1970). Two years later, in 1972, the National Commission issued

its report,[5] recommending that the workers' compensation system remain state-based: "We reject the suggestion that Federal administration be substituted for State programs at this time." 118 Cong. Rec. 26, 190-91.

On January 4, 1973, Senators Harrison Williams and Jacob Javits introduced the Williams-Javits Pension Reform bill to amend the Welfare and Pension Plans Disclosure Act ("WPPDA"), Pub. L. No. 85-836, 72 Stat. 997 (1958).[6] This bill left intact the language of section 4(b)(2) of the WPPDA, which provided that the legislation shall not apply to an employee welfare or pension benefit plan if

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[5] At Senator Javits's request, the Major Conclusions and Recommendations of the National Commission were printed in the Congressional Record. 118 Cong. Rec. 26, 186-92 (1972).

[6] *See* 119 Cong. Rec. 130 (1973) (Statement of Senator Williams introducing S. 4, 93d Cong., 1st Sess. (1973)), *reprinted in* 1 Legislative History of the Employee Retirement Income Security Act of 1974 (Committee Print compiled by the Senate Committee on Labor and Public Welfare) 90 (1976) ("ERISA Legislative History").

The Senate eventually added the language of S. 4, as amended, to the Senate version of H.R. 4200. *See* 119 Cong. Rec. 30, 416 (1973) (Statement of Senator Long), *reprinted in* 2 ERISA Legislative History 1880. The Senate subsequently substituted this version of H.R. 4200 for the language of H.R. 2. *See* 120 Cong. Rec. 4, 977 (1974) (Statement of Senator Williams), *reprinted in* 3 ERISA Legislative History 3597. Thus, the version of H.R. 2 ultimately passed by the Senate in 1974 was derived directly from the Williams-Javits bill.

> such plan was established and is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability insurance laws.

See S. Rep. 93-127, 93d Cong., 1st Sess. 53 (1973), *reprinted in* 1 ERISA Legislative History at 639. Similarly, the House bill, H.R. 2, retained the language of section 4(b)(2) of the WPPDA. H.R. 2, 93d Cong., 1st Sess, § 101(b)(2) (1973), *reprinted in* 1 ERISA Legislative History at 15.[7] Language exempting workers' compensation plans from the legislation ultimately became (with insignificant changes) 29 U.S.C. § 1003(b)(3).[8]

Throughout the legislative process, Congress expressly exempted from the coverage of the ERISA legislation any plan that was maintained solely for the purpose of complying with the type of state law Maine is

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[7] The House Report accompanying H.R. 2 explained that the law's fiduciary responsibility and disclosure requirements:

> would cover all private employee benefits plans under Commerce Clause jurisdiction except:
>
> . . .
>
> (2) Plans required under workmen's compensation, unemployment compensation and disability insurance laws . . . .

H.R. Rep. 93-533, 93d Cong., 1st Sess. 18 (1973), *reprinted in* 2 ERISA Legislative History at 2365.

[8] "[W]as established and is maintained" in the WPPDA was changed to "is maintained" in ERISA, while "unemployment compensation disability insurance laws" in the WPPDA was changed to "unemployment compensation or disability insurance laws" in ERISA.

attempting to enforce against CMI. Though House and Senate versions both contained preemption provisions, neither could be read as applying to workers' compensation. *See Shaw*, 463 U.S. at 98 n. 18. The Conference Report made clear that "following title I generally, preemption will not apply to . . . workmen's compensation plans. . . . " H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 383 (1974), *reprinted in* 3 ERISA Legislative History 4650.

In sum, the relevant legislative history demonstrates that ERISA was not designed to preempt state workers' compensation laws. Nowhere in the legislative history is there any suggestion that Congress believed that ERISA was intended to federalize the area of workers' compensation or promote national administration of workers' compensation plans.

D. The Decision Below Is Consistent With Public Policy

The net effect of validating CMI's scheme would be to sanction the demise of this country's venerable, state-based workers' compensation system, substituting a voluntary compliance system that provides no guarantees of meaningful coverage for employees injured on the job. ERISA itself includes no provisions ensuring the solvency of a benefit plan. As this Court noted in *Shaw*, ERISA rules regarding reporting, disclosure and fiduciary responsibility apply to both pension and welfare plans, but the statute's funding requirements apply only to pension plans. 463 U.S. at 91. Thus, benefits could be completely illusory, since there would be no guarantee that the fund could indeed meet its obligations. If a state is

not entitled to require employers to secure their workers' compensation obligations through an insurance or self-insurance mechanism designed to ensure solvency, employers could evade their obligations under state workers' compensation by signing up with a low cost, fly-by-night ERISA plan that could leave injured workers high and dry.

Moreover, although CMI emphasizes that the IAEA plan is intended to provide the workers' compensation benefits mandated by Maine law, there is no guarantee that this situation would continue if preemption were found. Thus, ERISA provides for no minimum level of benefits, *Shaw,* 463 U.S. at 91, and an employer would be free to amend its benefits plan and change the level of offered benefits at any time. ERISA's imposition of fiduciary responsibilities on plan administrators would not protect employees. "There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second." *Musto v. America General Corp.,* 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied,* 490 U.S. 1020 (1989). Therefore, ERISA would not prohibit CMI from unilaterally changing the level of benefits provided in its ERISA plan.

It is unclear how, under CMI's scheme, Maine could ensure that mandated benefits are being provided. If employers could avoid complying with state-mandated levels of protection and regulatory oversight simply by integrating their workers' compensation program into a new or existing multi-benefit ERISA plan, the State then would have no investigative or enforcement power with

respect to any component of that plan and the exemption from ERISA preemption reflected in 29 U.S.C. § 1003(b)(3) would be made entirely optional. There is no public policy justification for such a result.

II. THE MAINE WORKERS' COMPENSATION ACT DOES NOT "RELATE TO" AN ERISA PLAN SO AS TO TRIGGER PREEMPTION.

As noted above, because this case is governed by § 1003(b)(3)'s exemption from preemption as interpreted in *Shaw*, this Court need not reach the second issue considered by the First Circuit below – whether the pertinent provisions of the Maine Workers' Compensation Act nevertheless "relate to" an employee benefit plan under 29 U.S.C. § 1144(a). Indeed, it would make no sense for this Court to declare in *Shaw* that a state statute may require an employer to maintain a separately administered plan under § 1003(b)(3) if the same state statute were nevertheless subject to preemption because it somehow also "related to" the employer's ERISA plan. Once a state statute is found to be exempt from preemption by virtue of § 1003(b)(3), therefore, no further inquiry is necessary.

Even if this issue were reached, however, *certiorari* should be denied because the decision of the First Circuit is entirely correct and the allegedly conflicting authority cited by Petitioner is distinguishable. Thus, the cases relied upon by Petitioner all involve a direct impact on the economics, operation, or structure of an ERISA-covered *plan*. This is true both of the Supreme Court

decisions cited by Petitioner[9] and of the Circuit Court decisions which Petitioner suggests are in conflict with the decision below.[10]

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[9] *E.g., District of Columbia v. Greater Washington Bd. of Trade*, ___ U.S. ___, 113 S.Ct. 580, 583-84 (1992) (law requiring any employer who voluntarily provided health insurance to its employees to continue that health insurance coverage for employees receiving workers' compensation); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (wrongful discharge action predicated on employer interference with attainment of rights under employee benefit plan); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (law prohibiting employee welfare benefit plans from exercising subrogation rights on a claimant's tort recovery); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (law prohibiting pension plans from reducing benefits by the amount of workers' compensation benefits).

[10] *E.g., Travitz v. Northeast Dept. ILGWU Health and Welfare Fund*, 13 F.3d 704, 709 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2165 (1994) (statute precluding recovery of benefits from tortfeasor eligible to receive benefits from an ERISA plan); *NYSA-ILA Medical and Clinical Services Fund v. Axelrod*, 27 F.3d 823 (2d Cir. 1994) (tax on gross receipts of medical facilities owned and operated by ERISA plan); *Travelers Insurance Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3625 (Mar. 9, 1994) (surcharge on hospital rates paid by ERISA plans); *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1561 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 406 (1992) (prevailing wage law favoring some ERISA plans over others); *Arkansas Blue Cross and Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1346 (8th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2305 (1992) (statute allowing beneficiaries, rather than administrator, control over who should receive ERISA plan benefits); *Michigan Carpenters Council Health and Welfare Fund v. C. J. Rogers, Inc.*, 933 F.2d 376 (6th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 585 (1991) (corporate reorganization laws allowing employer, unilaterally and in contravention of contractually agreed-upon terms, to alter obligation to an ERISA plan); *E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1103-1104 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct.

In contrast, the First Circuit Court of Appeals found correctly that the Maine law,

> while having an economic impact on CMI, does not have an economic impact in the IAEA Plan itself. Clearly, any law that increases a company's cost of doing business can be said to affect that business's ability to provide benefits under its welfare benefit plan. This is not the same, however, as imposing burdens on the welfare benefit plan itself. The increased cost or administrative burdens imposed by the state law must have some connection to the covered ERISA plan before the preemption analysis can come into play. *See United Wire, Metal and Machine Health & Welfare Fund v. Morristown Mem. Hosp.*, 995 F.2d 1179, 1193 (3d Cir. 1993) ("Where there is no direct nexus between a state statute and ERISA plans, no effect on the manner of such plans' conducting business or their ability to operate in interstate commerce, statutes have been upheld despite the fact that they may have the indirect ultimate effect of increasing plan costs.").

22 F.3d at 7 (Pet. App. 16a).

Petitioner acknowledges the distinction drawn by the First Circuit (Petition at 27) but offers no countervailing authority. All of the cases on which it relies involve state laws that impose cost burdens upon ERISA-covered plans, not merely upon an employer's cost of doing business. Thus Petitioner's assertion that "[i]t has been found

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585 (1991) (tax on ERISA plan administrative fees and benefits); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992) (common-law claim of breach of oral promise to pay pension benefits).

by the District Court in this case that the Maine law does have a resulting increase in costs" (Petition at 29) simply misses the point. First, Petitioner's assertion takes license with the district court's order, because the Magistrate Judge's Recommended Decision on Motion for Preliminary Injunction at 7 (Pet. App. 28a-29a) actually found that "there *may* be duplication or increased cost." (emphasis added). Second, the assertion is wrong, because the Magistrate Judge was referring to duplication or increased cost to be incurred by *CMI*, not the IAEA Plan. *See id.*

In sum, while the First Circuit noted that the question of whether ERISA preempts any state statute imposing increased costs upon an ERISA-covered plan is not settled, 22 F.3d at 7 n. 5 (Pet. App. 15a), this case involves a potential increase in the employer's cost of doing business, not an increase in the cost of its ERISA plan. Although this issue need not be reached since *Shaw* controls this case, we submit that the First Circuit decision on this issue was correct and does not conflict with the decisions of other Circuits.

CONCLUSION

The Court should deny the Petition for Writ of *Certiorari.*

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